BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MANUEL J. DOMINGUEZ-RODRIGUEZ Claimant	)	
VS.	)	Docket No. 1,058,613
AMARR GARAGE DOORS Respondent	)	
AND	)	
TRAVELERS INDEMNITY COMPANY Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the February 7, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Brad E. Avery. George H. Pearson of Topeka, Kansas, appeared for claimant. Samantha N. Benjamin-House of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 31, 2012, preliminary hearing and exhibits thereto, and all pleadings contained in the administrative file.

ISSUES

Claimant asserts he met with personal injury by accident on November 7, 2011, arising out of and in the course of his employment. At the preliminary hearing, claimant requested medical treatment and temporary total disability benefits. Respondent denies claimant met with personal injury by accident and that claimant's injury arose out of and in the course of his employment. Respondent alleges that if claimant suffered a personal injury, it occurred at his home during the weekend before November 7, 2011. In the alternative, respondent asserts that if claimant suffered an accident at work on November 7, 2011, that accident was not the prevailing factor that caused claimant's medical condition and disability.

Respondent further asserts claimant is not entitled to temporary total disability benefits (TTD). Respondent alleges that claimant is not temporarily totally disabled because respondent could have accommodated his work restrictions had he not been terminated for cause due to excessive absenteeism. Respondent argues in the alternative that if claimant is entitled to TTD, claimant's TTD should not extend beyond November 18, 2011.

The ALJ found claimant met with personal injury by accident on November 7, 2011, arising out of and in the course of his employment with respondent and that claimant's accident was the prevailing factor causing claimant's injury. He also determined that claimant was not terminated for just cause. The ALJ ordered medical treatment with Dr. Bernhardt and TTD paid at the rate of $293.34 per week commencing November 17, 2011, until further order or until claimant has been returned to substantial and gainful employment or released at maximum medical improvement. Respondent appeals but in its Application for Review and brief to the Board it did not address the issue of whether the Board had jurisdiction to review the preliminary Order of the ALJ. Claimant asks the Board to affirm the ALJ's preliminary Order, and in his brief did not address the issue of jurisdiction. Therefore, the issues are:

1. Did claimant sustain a personal injury by accident on November 7, 2011, arising out of and in the course of his employment with respondent.

2. If so, was claimant's accident on November 7, 2011, the prevailing factor causing his injury?

3. Does the Board have jurisdiction to review the issue of whether the ALJ erred by ordering TTD?

4. If so, is claimant entitled to TTD?

5. If claimant is entitled to TTD, should those benefits extend beyond November 18, 2011?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant helps build garage doors and arrives at work each day at 6:30 a.m. He starts the day by pushing an empty cart approximately 200 to 300 feet to get garage door panels. The wheel on the cart he was using did not operate properly, so he had to both push and pull it in order to control it. He testified that a cart full of garage door panels ranges from 100 to 200 pounds, and it takes claimant 15 to 20 minutes to complete a round trip to get materials. At his workstation, claimant's primary job duty was to attach

end styles, which weigh less than a pound, to garage door panels. The process requires claimant to use a cordless drill to attach the end styles to the panels with two screws. Once the panels are used up, he makes another trip to get more panels. After making two trips over a period of 45 minutes, claimant's left lower back began to stiffen. Claimant testified he started feeling pain when he was pushing and pulling the cart. When he returned to his work position, he bent over to pick up a style and could not straighten up.

A fellow employee advised claimant to report the injury to a supervisor and claimant told his supervisor, Joy Reed, what happened. Claimant can speak and understand English, but his primary language is Spanish. An interpreter was utilized at the preliminary hearing for claimant's testimony. Claimant indicated he spoke to Ms. Reed in English. Claimant told Ms. Reed he injured his back while lifting and could not lift doors anymore.

Ms. Reed testified that on November 7, 2011, claimant did indeed complain of back pain every time he bent over. However, when asked if he hurt himself at work, claimant indicated the injury occurred during the previous weekend. Ms. Reed acknowledged that she has a hard time understanding claimant when he gets excited. However, she testified, "in the end I know what he's telling me."[1] On November 7, 2011, Ms. Reed sent an e-mail to Teresa Fowler, safety administrator for respondent, which indicated claimant complained of back pain, but that claimant said it was not work related.[2] Her e-mail did not indicate claimant injured himself during the weekend.

Claimant testified that he did not tell Ms. Reed his injury occurred the weekend before November 7, 2011, and does not know why she would say this. According to claimant, when he reported the injury to Ms. Reed, she told him two times, "you know that this didn't happen here."[3] He then said okay and Ms. Reed told him to go to his own doctor. Claimant then went home.

Claimant's wife was at work on November 7, 2011, when she received a telephone call from claimant a little before 9:00 a.m. Claimant was in pain and requested that she come home, which she immediately did. Claimant's wife had to assist him to their automobile and transported him to Stormont-Vail Health Care (Stormont-Vail). On the way to Stormont-Vail, claimant said he was injured at work, but his supervisor, Joy Reed, said it could not happen at work. Claimant's wife testified that before claimant went to work on November 7, 2011, his back was normal.

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[1] P.H. Trans. at 28.

[2] *Id.*, Resp. Ex. A.

[3] *Id.*, at 41.

The records from Stormont-Vail emergency room indicate claimant reported that he stood up at work and had a sudden onset of lumbar pain. No x-rays, MRIs or other diagnostic tests were conducted. Claimant was released to go home that same afternoon.

On November 9, 2011, claimant saw Dr. Michael Geist, who assessed claimant with low back pain and spasm. He prescribed medication for claimant and indicated claimant could not return to work. Claimant saw Dr. Geist again on November 10, 2011. Dr. Geist indicated claimant could return to work if there was "strict light duty available."[4] Specifically he restricted claimant from lifting more than five pounds, no bending, squatting or twisting and sitting less than two hours in an eight-hour workday.

At the request of his attorney, claimant was seen on January 10, 2012, by Dr. Edward J. Prostic, an orthopedic specialist. Dr. Prostic's report indicates claimant was injured at work. Claimant related how he had been moving carts and lifting equipment when he felt a worsening of pain from his back to his left leg. Dr. Prostic took x-rays which revealed significant disc space narrowing at L5-S1. He stated:

> On or about November 7, 2011, Manual *[sic]* J. Dominguez-Rodriquez *[sic]* sustained injury to his low back during the course of his employment. He has an unspecified injury to his low back, most likely with contained disc protrusion. Conservative care should be offered with intermittent heat or ice and massage, therapeutic exercises, medicines, and physical therapy. Presently, the patient may return to light/medium-level employment with lifting 35 pounds occasionally knee-to-shoulder. The work-related accident of November 7, 2011 is the prevailing factor in the injury and need for treatment.[5]

Claimant testified that he was kept off work by Dr. Geist until Monday, November 14, 2011. Claimant had previously gotten permission from Ms. Reed to see a dentist on November 14, 2011. Ms. Reed testified that she told claimant if he went to the appointment, his job was in jeopardy, but that despite her warning, claimant went to the appointment. Claimant testified that he would not have gone to the dentist if he was told by Ms. Reed that he would be fired if he went. Claimant was terminated by respondent on November 16, 2011, for excessive absenteeism.

The ALJ's findings are set out above. In his preliminary Order, the ALJ stated, "To deny benefits based upon absences due to workers compensation injuries is contrary to the intent of the Act."[6] He went on to say that "it would be tautologically unjust to construe

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[4] *Id.*, Cl. Ex. 2.

[5] *Id.*, Cl. Ex. 1 at 2.

[6] ALJ Order (Feb. 7, 2012) at 3.

the Workers Compensation Act to deny temporary total benefits to a worker based upon his absences from work due to a workers compensation injury."[7]

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(c) provides:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 provides in relevant parts:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
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> (f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> (B) An injury by accident shall be deemed to arise out of employment only if:
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> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

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[7] *Id.*

> (3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
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> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
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> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
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> (iii) accident or injury which arose out of a risk personal to the worker; or
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> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
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> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2011 Supp. 44-534a(a)(2) provides the Board may review only the following issues determined by an ALJ in his or her preliminary Order:

> A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

K.S.A. 2011 Supp. 44-551(i)(2)(A) states in part:

> If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 2011 Supp. 44-510c provides in relevant parts:

> (b)(2)(A) Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary restrictions for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, provided that if there is an authorized treating

> physician, such physician's opinion regarding the employee's work status shall be presumed to be determinative.
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> . . . .
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> (C) If the employee has been terminated for cause or voluntarily resigns following a compensable injury, the employer shall not be liable for temporary total disability benefits if the employer could have accommodated the temporary restrictions imposed by the authorized treating physician but for the employee's separation from employment.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[9]

ANALYSIS

Claimant testified that he told his wife and Ms. Reed, his supervisor, that he was injured at work. The records from Stormont-Vail and Drs. Geist and Prostic indicate claimant injured his back on November 7, 2011, while performing his job duties for respondent. Ms. Reed testified that claimant reported that he injured his back over the weekend. The ALJ found claimant's wife was a "truthful, credible witness and an articulate historian."[10] This Board Member concurs.

As the Kansas Court of Appeals noted in *De La Luz Guzman-Lepe*,[11] appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the fact finder. "One of the reasons that appellate courts do not assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful."[12]

Here, the ALJ had the opportunity to assess the testimony of claimant, his wife and Ms. Reed. The Board generally gives some deference to an ALJ's findings and

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[8] K.S.A. 44-534a.

[9] K.S.A. 2011 Supp. 44-555c(k).

[10] ALJ Order (Feb. 7, 2012) at 2.

[11] *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

[12] *State v. Scaife*, 286 Kan. 614, 624, 186 P.3d 755 (2008).

conclusions concerning credibility where the ALJ personally observed the testimony. Based upon the evidence presented, the ALJ concluded claimant presented sufficient evidence to prove he suffered a personal injury by accident on November 7, 2011, arising out of and in the course of his employment. This Board Member concurs with the ALJ's findings on this issue.

The only medical provider that addressed the issue of whether claimant's accident on November 7, 2011, was the prevailing factor in causing his injury was Dr. Prostic. His opinion was that claimant's accident was indeed the prevailing factor causing claimant's injury and his need for treatment. This opinion was not controverted by another physician. Accordingly, this Board Member finds that claimant's accident was the prevailing factor causing claimant's injury and his need for treatment.

The Board's jurisdiction to review preliminary Orders is set out in K.S.A. 2011 Supp. 44-534a(a)(2) and K.S.A. 2011 Supp. 44-551(i)(2)(A). The language of K.S.A. 2011 Supp. 44-534a(a)(2) does not grant the Board jurisdiction to review whether the ALJ erred by granting claimant TTD. Therefore, the Board only has jurisdiction to review the preliminary Order granting TTD if the ALJ exceeded his authority. In its brief, respondent did not assert the ALJ exceeded his jurisdiction by ordering TTD. The ALJ did not exceed his jurisdiction by rejecting respondent's argument that claimant was terminated for cause and ordering respondent to pay claimant TTD commencing November 17, 2011, until further order or until claimant has been returned to substantial and gainful employment or released at maximum medical improvement. The Board does not have jurisdiction to review whether the ALJ erred in granting claimant TTD.

CONCLUSION

1. Claimant met his burden of proof that he sustained a personal injury by accident on November 7, 2011, arising out of and in the course of his employment with respondent.

2. Claimant's accident on November 7, 2011, was the prevailing factor causing his injury.

3. The Board does not have jurisdiction to review the issue of whether the ALJ erred by ordering TTD. Accordingly, the issues raised in respondent's brief concerning TTD are dismissed.

WHEREFORE, the undersigned Board Member affirms the February 7, 2012, preliminary hearing Order entered by ALJ Avery.

IT IS SO ORDERED.

Dated this ____ day of April, 2012.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Brad E. Avery, Administrative Law Judge